

and rebates.⁵³ I am not aware that this action by BMS had any effect on the reporting practices of the publications.⁵⁴

24. It is my opinion that the BMS price reporting practices are reasonable and appropriate. The list prices that BMS reports to the pricing publications are the prices that BMS uses in sales to wholesalers and are the prices at which wholesalers often sell to their customers when there are no manufacturer discounts or "chargebacks." The vast majority of BMS net revenue at issue from 1993 through 2002, 86 percent, was generated from transactions at or about list price.⁵⁵ BMS does not include discounts or rebates in the list price, and that is consistent with common business practice; a list price, typically by definition, does not include discounts or rebates. Further, it apparently did not make any difference to the reported AWP when BMS told the pricing publications that there were discounts and rebates that were not included in the WLPs.
25. The only remaining question is whether BMS should reduce its list prices as average transaction prices decline. In my opinion, such action would not be economically rational. Even after a product becomes subject to generic competition, there remains a segment of customers that continue to be willing to pay at or about the list price for the branded product. By reducing the list price to wholesalers, BMS would be losing revenues. In the pharmaceutical industry, as with most businesses, differential pricing and market segmentation is perfectly rational and economically beneficial behavior. As discussed below, that is all that BMS has done. Finally, to the extent that payors choose to reimburse based on the AWP reported by the pricing publications, BMS could not be expected to report a price other than the WLP to the pricing publications.

V. THE BMS ONCOLOGY BUSINESS MODEL

A. BMS PRICING STRATEGY

26. BMS is a "brand-name" pharmaceutical company. As such, BMS invests heavily in the research and discovery of new products with valued clinical attributes. At launch, BMS engages in market research to determine an appropriate list price for the product, a price at which the vast majority of revenue will be realized, at least until the advent of significant therapeutic competition and maybe until the launch of generic competition. Over the patent period, BMS will take periodic list price increases in recognition of prevailing market conditions, including the prices of competing therapies. With Taxol,

⁵³ Declaration of Zoltan Szabo in Support of Defendant Bristol-Myers Squibb Company's Memorandum in Opposition to Plaintiffs' Motion for Class Certification ("Szabo Declaration"), October 25, 2004, ¶ 5.

⁵⁴ Morgan Deposition, pp. 226-227.

⁵⁵ Exhibit E.